ENSCO GERUDI (M) SDN BHD v. KETUA PENGARAH HASIL DALAM NEGERI

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICAL REVIEW NO: WA-25-233-08-2020]
1 JULY 2021

ADMINISTRATIVE LAW: *Judicial review – Application for – Application to review decision of Director General of Inland Revenue ('DGIR') – DGIR initiated audit on matter already determined by superior courts – Whether earlier decision of superior courts binding on parties – Whether DGIR's decisions to raise tax assessments illegal and in excess of jurisdiction – Whether DGIR had duty to give reasons for decisions – Whether there were exceptional circumstances warranting judicial review application – Income Tax Act 1967, ss. 91(3) & 140A*

The applicant was a company involved in the business of providing offshore drilling services, including leasing drilling rigs, to oil and gas operators in Malaysia. In order to provide those services, the applicant entered into a master charter agreement ('agreement') with Ensco Labuan Limited ('ELL'), a third party contractor, to lease drilling rigs from ELL. As part of the agreement, the applicant agreed to pay ELL a percentage of the applicable day rate that the applicant earned from its drilling contracts with its customers for the drilling rigs. In 2018, the respondent initiated its audit on the applicant for the years of assessment ('YAs') 2015 to 2017. In its first audit findings, the respondent took the position that the pricing of the leasing transactions between the applicant and ELL were not at arm's length, pursuant to s. 140A of the Income Tax Act 1967 ('ITA'). The respondent proposed that the profit earned by ELL should remain with the applicant by reducing the cost of the leasing asset by 20% or equivalent to the margin obtained by ELL. The applicant disputed the first audit findings on the following grounds: (i) the applicant assumed a low functional and risk profile. The applicant prepared a transfer pricing policy that reflected a margin of 20% from the total rental of the rig to be paid to ELL. A disallowance of the same would result in non-adherence to the arm's length principle, which was typically applied to related parties but may be applied to non-related parties as well; (ii) the High Court decision in *Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* held that the respondent's decision to adjust the tax position of the transactions between the applicant and ELL was illegal as the applicant and ELL did not have control over one another within the ambit of the ITA. This was upheld by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v. Ensco Gerudi (M) Sdn Bhd* (the High Court and Court of Appeal decisions were collectively referred to as '*Ensco Gerudi* (2013)'; and (iii) the respondent could not attempt to re-open and re-

litigate an issue which had been conclusively decided by the courts in the applicant's favour. The respondent subsequently issued its second audit findings, maintaining the same position as it did in the first audit findings. The respondent then issued its final audit findings as the following: (i) a 5% mark-up was to be imposed on the leasing charges; and (ii) the respondent dismissed the applicant's use of the transactional net margin method ('TNMM method') as the transfer pricing methodology and insisted on the application of the transactional profit split method ('profit split method') instead. In response, the applicant issued the following explanation: (i) based on the detailed analysis set out in the applicant's transfer pricing analysis and report ('transfer pricing documentation') which were submitted to the respondent, the TNMM method was the most appropriate transfer pricing methodology; (ii) the respondent's proposed profit split method was unsuitable because one party ('the applicant') to the transaction performed only simple functions; and (iii) when the TNMM method was applied, the applicant fell within the inter-quartile range of the comparable companies. Hence, the applicant's transactions with ELL adhered to the arm length's principle. The applicant's explanation, however, was rejected and the respondent went on to issue the notices of additional assessment for YAs 2012 to 2017, collectively amounting to RM106,766,976.02 in additional taxes and penalties ('decisions'). Hence, the present application for judicial review on the grounds that the respondent's decisions were illegal and ought to be quashed as the respondent (i) acted in excess of its jurisdiction when it failed to act in accordance with *Ensco Gerudi* (2013); (ii) unlawfully invoked s. 140A of the ITA when it was clear that the applicant and ELL were not 'associated persons' with one another within the definition of the ITA; (iii) breached its duty to provide reasons when it issued the decisions without providing any clear reasons and/or justifications as to (a) how the applicant and ELL were associated persons; and (b) the respondent's preferred pricing methodology.

Held (granting order in terms of applicant's application):

(1) In 2014, the Court of Appeal upheld the decision of the High Court in *Ensco Gerudi* (2013). Four years later, the respondent initiated the impugned audit *ie*, for the YAs 2012 to 2017. The facts surrounding the operations of the applicant and ELL remained the same. There was no change in facts surrounding the management of the entities to show that there had been a shift in the control since *Ensco Gerudi* (2013). However, to circumvent the decision in *Ensco Gerudi* (2013), the respondent now applied different provisions of the ITA on essentially the same facts as that in *Ensco Gerudi* (2013). The leasing transactions arising out of the agreement entered between the applicant and ELL remained the subject of the current transfer audit, as was the case back in 2013. The respondent's decisions led to the present judicial review application.

The only difference was that the respondent now sought to rely on the latest transfer pricing provision of s. 140A of the ITA to make adjustments to the arm length's price of the applicant's transactions with ELL for the YAs 2012 to 2017. The respondent was attempting to re-adjust the applicant's taxability without regard to the fact that the High Court had already made findings of law and facts on the requirements of s. 140(6) of the ITA which were essentially the same as s. 140A(5) of the ITA. In addition, the High Court held that the applicant and ELL were not in control of one another and the decision was affirmed by the Court of Appeal. Since the same issues had already been determined in the applicant's favour by both the High Court and the Court of Appeal, the respondent had exceeded its jurisdiction and acted unlawfully when it failed to give due consideration to the earlier decisions of the superior courts of Malaysia. (paras 36, 37 & 40)

(2) The applicant was not the only one left in the dark as to how the respondent came to its transfer pricing adjustments; the court was also deprived from knowing the respondent's version of what the transfer pricing report ought to be. There was a duty on the part of the respondent, being an important public authority, to give its reasons, more so when the issues pertaining to transfer pricing were complex matters and could never be straightforward. At the very least, the most basic transfer pricing report by the respondent would be able to shed some light on the applicant on this issue because, without some basis, how would the applicant be able to adequately defend itself before the Special Commissioners of Income Tax ('SCIT'). There was no evidence available in any documentary form, from the respondent to show what would have been the leasing rates payable between independent persons dealing in arm's length. The respondent had acted arbitrarily by not proffering any reasons and evidence to support its decisions and, as such, the decisions amounted to a breach of the principles of natural justice and procedural fairness. (paras 49, 50 & 55)

(3) It was apparent that from the audit finding letters and the bundles of documents tendered by the applicant, there were lengthy and extensive audit done by the respondent relating to the present matter. However, at no point of time during the course of the lengthy auditing, the respondent ever cited any instances of negligence, fraud or wilful default on the part of the applicant which justified the invocation of its powers under s. 91(3) of the ITA. There was no evidence or proof whatsoever. The respondent demonstrated absence of considerations or reasons in its decisions in lifting the time-bar. The respondent did not raise any allegations of fraud, wilful default or negligence during the course of the audit nor during the issuance of the notices of additional assessment. A taxing authority would have been able to discern if the applicant had

neglected any of its duties under the ITA or could have detected any fraud or wilful default on the part of the applicant considering the extensive documents provided during the course of and the lengthy duration of time taken in the audit. Instead, what the respondent was now saying was, for the parties to go before the SCIT and 'find out' whether there was any negligence, fraud or wilful default committed by the applicant in its transfer pricing policy. The respondent ought to have come to a finding to support a conclusion of wrongdoing by the applicant for it to exercise the power under s. 91(3) of the ITA. The respondent's failure to particularise the basis for the exercise of its powers was fatal. The respondent's decisions were so unreasonable that no reasonable tax authority would have come to it. The respondent also took into account irrelevant considerations and ignored relevant considerations in coming to its decisions in an unreasonable manner, entitling the court to make the order to quash the decisions. (paras 60-63)

(4) The mere fact that the applicant may appeal to the SCIT did not mean that the applicant lost its rights to appeal to the High Court by way of judicial review. In the present matter, exceptional circumstances of the case had been established at the leave stage which was a starting point in judicial review cases. Illegality, unlawful treatment, error of law and failure to adhere to legal principles established by the courts tantamount to an excess of jurisdiction and all of which have been demonstrated by the applicant. It would be wrong to insist that the applicant exhausted its statutory right of appeal, even if it was available. In fact, a complaint that raised a question of law, as in the present case, would preferably be referred to the court, being a more appropriate forum. (paras 64 & 66)

Case(s) referred to:

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1947] 2 All ER 680 ***(refd)***

Chong Woo Yit v. Government Of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC ***(refd)***

Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (Judicial Review No: 25-101-05-2013) (Unreported) ***(refd)***

Government Of Malaysia v. Gan Chuan Lian [1992] 1 CLJ 678; [1992] 2 CLJ (Rep) 424 HC ***(refd)***

Government Of Malaysia v. Ng Song Choon [1974] 1 LNS 41 HC ***(refd)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***

Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Ensco Gerudi (M) Sdn Bhd (Civil Appeal No: W-01-51-01-2014) (Unreported) ***(refd)***

Magnum Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Other Cases [2018] 1 LNS 2278 HC ***(refd)***
Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***
Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri [2011] 1 LNS 1002 HC ***(refd)***
MM Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] MSTC 10-046 ***(refd)***
National Land Finance Co-operative Society Ltd v. Director General Of Inland Revenue [1993] 4 CLJ 339 SC ***(refd)***
Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] CLJ 83; [1981] CLJ (Rep) 74 FC ***(refd)***
Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors [2021] 2 CLJ 808 CA ***(refd)***
SIS Forum (Malaysia) & Ors v. Jawatankuasa Fatwa Negeri Selangor & Ors [2018] 6 CLJ 748 CA ***(refd)***
Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais [2020] 9 CLJ 521 CA ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 91(3), (5), 139(1), (2), 140(1)(c), (6), 140A(1), (2), (3), (5), (5A), (5)(c)

For the applicant - Jason Liang, Anlynn Ng & Kellie Yap; M/s Wong & Partners
For the respondent - Ahmad Isyak Mohd Hassan; SRC & Mohammad Danial Ahmad; RC

Reported by Najib Tamby

JUDGMENT

Noorin Badaruddin J:

[1] This is an application for judicial review filed by the applicant against the respondent's decision in the form of notice of additional assessment dated 22 July 2020 and audit findings dated 23 October 2019, 30 January 2020 and 22 June 2020.

Background Facts

[2] The applicant is a private limited company incorporated in Malaysia on 29 July 1994 and is primarily in the business of providing offshore drilling services, including leasing drilling rigs, to oil and gas operators in Malaysia.

[3] In order to provide the said services, the applicant entered into a master charter agreement dated 21 September 2006 (amended on 17 August 2011) ("master charter agreement") with Ensco Labuan Limited ("ELL"), a third-party contractor, to lease drilling rigs from ELL. The applicant then rents out the drilling rigs to its own customers.

[4] As part of the master charter agreement, the applicant agreed to pay ELL a percentage of the applicable day rate that the applicant earns from its drilling contracts with its customers for the drilling rigs.

[5] By way of a letter dated 12 October 2018, the respondent initiated its audit on the applicant for the years of assessment ("YAs") 2015 to 2017. The respondent requested for further and specific information and documents from the applicant during the course of the audit. The applicant duly complied with the respondent's requests on every occasion.

[6] The respondent issued its first audit findings letter on 23 October 2019 where it took the position that the pricing of the leasing transactions between the applicant and ELL are not at arm's length pursuant to s. 140A of the Income Tax Act 1967 ("ITA"). The respondent proposed that the profit earned by ELL should remain with the applicant by reducing the cost of the leasing asset by 20% or equivalent to the margin obtained by ELL.

[7] The applicant responded to the respondent's first audit findings letter *vide* a letter dated 23 October 2019 disputing the respondent's audit findings on the following grounds:

(i) the applicant assumes a low functional and risk profile. The applicant prepared a transfer pricing policy that reflects a margin of 20% from the total rental of the rig to be paid to ELL. A disallowance of the same would result in non-adherence to the arm's length principle (which is typically applied to related parties but may be applied to non-related parties as well).

(ii) the High Court decision in *Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (Application For Judicial Review No: 25-101-05-2013) held that the respondent's decision to adjust the tax position of the transactions between the applicant and ELL was illegal as the applicant and ELL do not have control over one another within the ambit of the ITA. This was upheld by the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v. Ensco Gerudi (M) Sdn Bhd* (Civil Appeal No: W-01-51-01-2014).

(The High Court and Court of Appeal decisions are collectively referred to as "*Ensco Gerudi* (2013)".)

(iii) As such, the respondent cannot attempt to reopen and re-litigate an issue which has been conclusively decided by the courts in the applicant's favour.

[8] Subsequently, the respondent issued its second audit findings letter dated 30 January 2020. In essence, the respondent maintained the same position as it did in the first audit findings letter.

[9] By a letter dated 22 June 2020 from the respondent to the applicant, the respondent issued its final audit findings letter. In summary, the findings are as follows:

(i) a 5% mark-up is to be imposed on the leasing charges; and

(ii) the respondent dismissed the applicant's use of the transactional net margin method ("TNMM method") as the transfer pricing methodology and insisted on the application of the transactional profit split method ("profit split method") instead.

[10] *Vide* a letter dated 10 July 2020, the applicant issued its response to the respondent's final audit findings letter. The applicant explained as follows:

(i) based on the detailed analysis set out in the applicant's transfer pricing analysis and report ("transfer pricing documentation") which were submitted to the respondent, the TNMM method is the most appropriate transfer pricing methodology;

(ii) the respondent's proposed profit split method is unsuitable because one party (the applicant) to the transaction performs only simple functions; and

(iii) when the TNMM method is applied, the applicant falls within the inter-quartile range of the comparable companies. Hence, the applicant's transactions with ELL adhere to the arm's length principle.

[11] The applicant's explanation was rejected and the respondent went on to issue the notices of additional assessment dated 22 July 2020 for YAs 2012, 2013, 2014, 2015, 2016 and 2017 amounting to RM10,942,878.05, RM23,834,114.85, RM35,717,009.25, RM25,719,036.25, RM6,430,898,05, and RM4,123,039.57 (and collectively amounting to, RM106,766,976.02) in additional taxes and penalties (collectively, referred to as the "decisions").

[12] The applicant's application for leave for judicial review was granted by Her Ladyship Mariana Yahya J (as Her Ladyship then was) on 22 December 2020, on the following grounds:

(i) despite there being alternative route of remedy, there are exceptional circumstances that the applicant has presented to the court justifying the suitability of judicial review; and

(ii) the court is satisfied that judicial review application is suitable for this case as the respondent acted in excess of its jurisdiction and had failed to take into account the previous decisions of the High Court and Court of Appeal upon issuing its decisions.

A **Summary Of The Applicant's Contentions**

[13] Summarily, the applicant contends that the respondent's decisions are illegal and ought to be quashed based on the following grounds:

(i) the respondent acted in excess of its jurisdiction when it failed to act in
B accordance with previously decided cases by the High Court and the Court of Appeal in *Ensco Gerudi* (2013);

(ii) the respondent had unlawfully invoked s. 140A of the ITA, when it is clear that the applicant and ELL are not "associated persons" with one another within the definition of the ITA (applicable for the relevant
C years of assessment);

(iii) the respondent cannot rely on the definition of "control" under s. 140A(5A) of the ITA which only came into force in January 2019; and

D (iv) the respondent had breached its duty to provide reasons when it issued the decisions without providing any clear reasons and/or justifications:

(i) as to how the applicant and ELL are associated persons; and

(ii) as to the respondent's preferred transfer pricing methodology.

E **Summary Of The Respondent's Contentions**

[14] At the outset, the respondent made its objection on the usual ground in tax appeal cases that the existence of an alternative statutory remedy ie, the appeal to the Special Commissioners of Income Tax to which the applicant has filed its appeal on 9 August 2020 makes the present application
F an abuse process of the court and that this court should not entertain the applicant's present judicial review application.

[15] The respondent contends that the issues in the present matter and that in *Ensco Gerudi* (2013) are different and are summarised as follows:

G (i) the ITA provisions relied upon by the applicant are different (ss. 140(6) and 140A(2) of the ITA);

(ii) the consequences of the provisions are different; and

(iii) the reliefs sought are different.

H **[16]** The respondent further argued that the applicant and ELL are associated persons because:

(i) section 140A gives the respondent the powers to make pricing adjustments on transactions with an associated person and this power should not be questioned;

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(ii) section 140A(5)(c) sets out what amounts to transactions with an associated person. This includes transactions between persons both of whom are controlled by some other person;

(iii) the test of control in s. 140A(5)(c) does not require there to be majority shareholding;

(iv) the guidance in s. 139 of the ITA of what amounts to control over a company does not apply; and

(v) the fact that the organisation chart in the applicant's transfer pricing documentation shows that the applicant and ELL are related companies implies that the applicant and ELL are controlled by the same company.

[17] According to the respondent, s. 140A of the ITA does not require consideration of the shareholding of a company to determine control.

[18] The respondent has stated at length that the difference in the methodology and the determination of the correct pricing is a question of fact that should be determined by the Special Commissioners of Income Tax and should not be subject to judicial review.

The Issues

[19] Based on the applicant's notice of application, affidavit-in-support, the order of the High Court granting leave (encl. 33), the issues for determination before this court are as follows:

(i) Whether the decision in *Ensco Gerudi* (2013) is binding on the parties herein and the respondent's decisions to raise tax assessments for the YAs 2012 to 2017 illegal, and in excess of its jurisdiction?

(ii) Are the applicant and ELL controlled by the same third person?

(iii) Has the respondent a duty to give reasons for its decisions and if so, has the respondent breached that duty?

(iv) Do the respondent's actions and/or failures amount to exceptional circumstances for a judicial review application?

(v) Can the respondent re-litigate the stay application?

Evaluation And Findings

Decision In Ensco Gerudi (2013)

[20] The same parties herein were involved in *Ensco Gerudi* (2013). The transaction in dispute in both *Ensco Gerudi* (2013) and the present matter involves the same leasing transactions arising out of the master charter agreement between the applicant and ELL. In *Ensco Gerudi* (2013), the respondent invoked s. 140(1)(c) of the ITA and the justifications were ELL is a company under the control of Ensco plc and ELL has no economic or commercial substance. The respondent contends that the economic and absolute rights over the assets (ie, the rigs) had not been transferred to ELL and ELL only does business with the applicant, and the purpose of the

transaction is more to benefit from the tax incentives provided. There was also a purported increase in the rental rate, providing the impression that the applicant is shifting profits through ELL to Ensco plc.

[21] In the same case, the respondent further attempted to rely on s. 140(6) of the ITA and alleged that the applicant and ELL are within the same group of companies and as such the transaction arising out of the master charter agreement between them were not at arm's length. Notwithstanding the issue arose only in the respondent's written submission therein, the High Court addressed the issue and found that there was no evidence adduced by the respondent showing that the applicant and ELL had transacted on a non-arm's length basis. The High Court found that the respondent showed scant scrutiny in proving the applicant to be in control of ELL or *vice versa* and/or to be controlled by some other person who also have control over ELL. The learned High Court Judge, Zaleha Yusof J (as Her Ladyship then was), went on further and stated as follows:

> [28] *Merely because both companies belong to the same group of companies does not mean that the same person of (sic) entity controls them both. Especially when the applicant is also made of Bumiputera shareholders whose interest would be unfairly disregarded.* It is important to note that the shareholders of the applicant and ELL are not similar at the point of incorporation. In the circumstances, the test applicable to enable the respondent to invoke Section 140(6) of Act 53 are not (*sic*) fulfilled in this case.
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> (emphasis added)

[22] The respondent contends that the scenario in the present matter is different from *Ensco Gerudi* (2013). The respondent is now seeking to rely on the latest transfer pricing provision of s. 140A of the ITA to make adjustments to the arm's length price of the applicant's transactions with ELL for the YAs 2012 to 2017. The respondent says that the applicant and ELL are associated persons because they are related companies within the same group companies and the pricing between the applicant and ELL are not at arm's length.

[23] It cannot be disputed that Parliament has given the power to make pricing adjustment to the respondent and that is reflected in ss. 140A(1) and 140A(3) of the ITA which provide as follows:

> 140A. Power to substitute the price on certain transactions
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> (1) This section shall apply notwithstanding section 140 and subject to any rules prescribed under this Act.
>
> (2) Subject to subsection (3), where a person in the basis period for a year of assessment enters into a transaction with an associated person for that year for the acquisition or supply of property or services, then, for all purposes of this Act, that person shall determine and apply the arm's length price for such acquisition or supply.

(3) Where the Director General has reason to believe that any property or services referred to in subsection (2) is acquired or supplied at a price which is either less than or greater than the price which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length, he may in determination of the gross income, adjusted income or adjusted loss, statutory income, total income or chargeable income of the person, substitute the price in respect of the transaction to reflect an arm's length price for the transaction.

[24] It is therefore clear that in order to invoke s. 140A(3) against a taxpayer such as the applicant, the respondent must first be satisfied that:

(i) there exists a relevant year of assessment;

(ii) that there is a transaction and that the said transaction is entered into with an associated person; and

(iii) there is an acquisition or supply of property or services.

[25] In regards to "associated person" s. 140A(5) defines as follows:

(5) The transactions referred to in subsection (2) shall be construed as a transaction between:

(a) persons one of whom has control over the other;

(b) individuals who are relatives of each other; or

(c) persons both of whom are controlled by some other person (in this section referred to as "third person").

[26] With regards to the test for "control", s. 140A(5A) states that:

Without prejudice to the generality of section 139, for the purpose of subsection (5), "control" refers to persons one of whom owns shares of the other person, or a third person who owns shares of both persons, where the percentage of the share capital held in either situation is twenty per cent or more and …

[27] Section 140A(5A) of the ITA came into force on 1 January 2019. Prior to 1 January 2019, the applicable provisions which define control are ss. 139(1) and (2) of the ITA which state as follows:

(1) For the purposes of this Act, a person shall be taken to have control of a company:

(a) if he exercises or is able to exercise or is entitled to acquire control (whether direct or indirect) over the company's affairs and in particular, without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire the greater part of the share capital or voting power in the company;

(b) if he possesses or is entitled to acquire either:

A (i) the greater part of the issued share capital of the company;

(ii) such part of that capital as would, if the whole of the income of the company were in fact distributed to the members, entitle him to receive the greater part of the amount so distributed; or

B (iii) such redeemable share capital as would entitle him to receive on its redemption the greater part of the assets which, in the event of a winding up, would be available for distribution among members; or

(c) if in the event of a winding up he would be entitled to the greater part of the assets available for distribution among members.

C (2) Where two or more persons together satisfy in respect of a company any of the conditions in subsection (1), they shall be taken to have control of the company.

[28] Throughout the audit, the applicant had made available to the D respondent its shareholding which reveals that the majority control in the applicant vests in three companies; Pacific Reward Sdn Bhd, Crimsonbay Sdn Bhd and Prominent Vision Sdn Bhd (hereinafter referred to as the "three companies") with local shareholders who are independent from the rest of the Ensco Group. The compositions of the shareholdings supplied by the applicant is reproduced as follows:

E **The Applicant**

Shareholder	Ordinary Shares	Preference Shares	(%) of ordinary shareholding
F Ensco Oceanics Company LLC	980,000	–	49
Ensco Offshore International Company	–	1,850,000	0
G Pacific Reward Sdn Bhd	60,000	–	3
Crimsonbay Sdn Bhd	480,000	650,000	24
H Prominent Vision Sdn Bhd	480,000	–	24
Total	**2,000,000**	**2,500,000**	**100**

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ELL

Shareholder	Ordinary Shares	Preference Shares	(%) of ordinary shareholding
Ensco Overseas Limited	1,000	–	100
Total	**1,000**	–	**100**

[29] It is clear from the composition of the shareholdings demonstrated in the above, the applicant and ELL are not "owned" by the same entity. The applicant is only 49% owned by Ensco Oceanics. The applicant and ELL do not possess or entitled to acquire the greater part of the share capital or voting power because to be able to have control under s. 139 of the ITA the applicant has to be at least 51% owned. Since the relevant year of assessment is before the amendment, the transactions therefore cannot be said to have fulfilled the definition under s. 139 of the ITA.

[30] The only justification that the respondent had provided in relation to this issue is that the transactions are carried out between the parties within the same group. But that is not a requirement under s. 140A of the ITA. In addition, the respondent had not proffered any justification on how the applicant and ELL are associated persons under s. 140A of the ITA. There is no justification either as to why the transaction between the applicant and ELL are said to be not at arm's length despite the fact that the High Court had made findings in *Ensco Gerudi* (2013) that the transactions between the applicant and ELL are at arms' length.

[31] It is settled law that the respondent, as a public decision-making body, is under a duty to give reasons for its decisions. (See the Federal Court's decision in the *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265; and *Pahang South Union Omnibus Co Bhd v. The Minister Of Labour & Manpower & Anor* [1981] CLJ 83; [1981] CLJ (Rep) 74; [1981] 2 MLJ 199). The duty to give reasons was recently affirmed by the court in *Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais* [2020] 9 CLJ 521; [2020] MLJU 1030.

[32] Section 140A(5)(c) of the ITA states that the transactions between associated persons include transactions between both persons both of whom are controlled by some other person (ie, third person). Section 140A of the ITA is silent on the definition of control. Nevertheless, guidance in relation to what amounts to control in a company is provided in s. 139 of the ITA which explicitly sets out the situation in which "a person shall be taken to

A have control of a company". Even if it is wrong to refer to s. 139 of the ITA as guidance, there is no evidence that the applicant and ELL are associated person. It can be seen from the composition of the applicant and ELL shareholdings, the majority shareholding in the applicant is held by local entities unrelated to the Ensco Group of companies and the applicant and
B ELL are not controlled by the same third person. Both the applicant and ELL therefore do not satisfy the prerequisites in s. 140A(5) of the ITA. The applicant is not in control of ELL *vice versa*.

[33] Section 140A(2) of the ITA empowers the respondent to make pricing adjustments in respect of transactions between associated persons to reflect
C an arm's length price. In the present matter, the leasing transactions in dispute cannot be said to be transactions carried out by the applicant with an associated person as the majority shareholding in the applicant is held by local entities unrelated to the Ensco Group of companies. The respondent seems to suggest that the applicant and ELL are somehow indirectly
D associated but it is not a requirement under s. 140A of the ITA that there must be an arm's length price in the pricing of leasing transactions between companies indirectly related to each other.

[34] Strict interpretation to the language of the law must be strictly adhered to and where a taxing Act is concerned, the Supreme Court in *National Land*
E *Finance Co-operative Society Ltd v. Director General Of Inland Revenue* [1993] 4 CLJ 339 had stated the followings:

> … in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied.
F One can only look fairly at the language used …

[35] Based on the above discussions it is the finding of this court that the leasing transactions between the applicant and ELL do not fall within the ambit of s. 139 and s. 140A of the ITA and as such the respondent's decisions in making the adjustments to the pricing of the leasing transactions between
G the applicant and ELL pursuant to s. 140A of the ITA are illegal and in excess of its authority.

[36] Returning to the *Ensco Gerudi* (2013) decision, the Court of Appeal had upheld the decision of the High Court in 2014. Four years later the respondent initiated the impugned audit herein ie, for the YAs 2012 to 2017.
H It is uncontroverted that the facts surrounding the operations of the applicant and ELL have remained the same. There is no change in facts surrounding the management of the entities to show that there has been a shift in the control since *Ensco Gerudi* (2013).

I

[37] However, to circumvent the court's decision in *Ensco Gerudi* (2013) the respondent is now applying a different provisions of the ITA on essentially the same facts as that in *Ensco Gerudi* (2013). The leasing transactions arising out of the master charter agreement entered between the applicant and ELL remains the subject of the current transfer pricing audit, as was the case back in 2013. The respondent's decisions led to the present judicial review application. The only difference is that the respondent now seeks to rely on the latest transfer pricing provision of s. 140A of the ITA to make adjustments to the arm's length price of the applicant's transactions with ELL for the YAs 2012 to 2017. This court agrees with the applicant's submission that the respondent is now attempting to re-adjust the applicant's taxability under the guise of a "different" provision under s. 140A of the ITA without regard to the fact that the High Court had already made findings of law and facts on the requirements of s. 140(6) of the ITA which are essentially the same as s. 140A(5) of the ITA. In addition thereto, the High Court had held that the applicant and ELL are not in control of one another and the decision was then affirmed by the Court of Appeal.

[38] It is trite law that the decisions of the courts are binding on the Executive. In *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 LNS 1002; [2011] 5 MLJ 447 Rohana Yusuf J (as Her Ladyship then was) rightly encapsulated the principle as follows:

> Thus the failure of the respondent to follow the decision of the Superior Courts in *Penang Realty* as well as *Lower Perak* renders its decision defective. These two cases are binding authorities on the respondent, being an arm of the executive. Also based on doctrine of *stare decisis* this court is also bound by the decisions of the superior court. Since the respondent's decision is not based on the legal authorities of the Superior Courts such decision is in excess of its authority.

[39] In *Magnum Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Other Cases* [2018] 1 LNS 2278; [2018] MLJU 101, the taxpayer was assessed by the respondent in 2017 on a similar legal issue concerning the deductibility of dividend and interest income which had already been decided by the High Court in 2001 (*albeit* for earlier years of assessments). In this regard, the High Court held that the respondent acted in excess of its jurisdiction to act in defiance of the judgments of the courts:

> There is no issue with regards to the principles enunciated by the cases cited above. However, in the present application, the applicant's complaint is that the DGIR has failed to apply the legal position in *Multi-Purpose Holdings Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2001] 8 CLJ 462 (involving the same parties) and that the DGIR is bound by the legal interpretation of that case. Since the DGIR had refused to apply the decision in *Multi-Purpose*, then the DGIR had exceeded his jurisdiction.

[40] Since the same issues have already been determined in the applicant's favour by both the High Court and Court of Appeal, this court again finds that the respondent had exceeded its jurisdiction and acted unlawfully when it fails to give due consideration to the earlier decisions of the superior courts of Malaysia.

The Issue On Correctness Of The Transfer Pricing Adjustments

[41] In their 102 pages of written submission, the respondent addressed at great length in relation to the methodology and the determination of the correct pricing adjustments and argued that it should be determined by the Special Commissioners of Income Tax and should not be subject to judicial review.

[42] The applicant on the other hand submits that the respondent is mistaken about the applicant's grievance in this judicial review application. The applicant has made clear during the leave application that the applicant is not aggrieved by a mere disagreement on transfer pricing policy. The applicant has acknowledged it and acknowledges here again that transfer pricing is more an art than science, and the applicant recognises that reasonable disagreements may arise between a taxpayer and the authorities. Parties may then discuss and debate on the appropriate technical position under transfer pricing principles.

[43] The applicant asserts that what they are aggrieved about is the respondent's failure to perform even the most perfunctory transfer pricing analysis in coming to its decisions. The applicant submits that no opposing transfer pricing report was produced by the respondent, nor was any functional or economic analysis performed by the respondent. Therefore the questions are how then, could the tax adjustments made by the respondent be trusted upon as reliable and correct? The applicant submits that it is this fundamental failure of reasonable duty by the respondent that is the issue before the court.

[44] Under s. 140A(5) of the ITA, if the respondent is of the opinion that certain transactions between associated persons were not done on terms which might fairly be expected to have been made by independent persons engaged in similar activities, the respondent has the discretion to make adjustments to ensure that such transactions were carried out at arm's length. The taxpayers will prepare its transfer pricing documentation to justify the arm's length price in related party transactions.

[45] The respondent has also published the Transfer Pricing Guidelines 2012 ("TP Guidelines") to guide taxpayers on the requirements expected in a transfer pricing document. The TP Guidelines sets out the steps required in the determination of an arm's length price at para. 7. In summary, the steps are:

(a) a functional analysis of the tested parties and transactions which covers the functions performed, assets utilised and risks assumed by those parties and other factors such as economic circumstances, business strategies and contractual terms;

(b) a characterisation of the tested parties or transaction based on the functional analysis;

(c) selecting the most appropriate transfer pricing methodology depending on the tested party or transaction (there are 5 accepted methods in this regard); and

(d) a benchmarking analysis or comparability analysis to find independent companies with similar characteristics based on the findings in the functional analysis.

[46] Paragraph 8 of the TP Guidelines is important to note and it states as follows:

> A comparability analysis is **a pre-requisite** in the application of all transfer pricing methods that conform to the arm's length principle. This involves comparing conditions in a controlled transaction with those in an uncontrolled transaction. (emphasis added)

[47] According to the applicant, its transfer pricing policy is compliant with the Malaysian Transfer Pricing Requirements. The applicant had submitted its TP Documentation for YAs 2012-2017 which were prepared in compliance with the requirements of the TP Guidelines. It is submitted that had the respondent thoroughly reviewed the TP documentation, it would have found that:

(i) the applicant has provided a functional analysis covering the applicant's functions, assets and risks;

(ii) the applicant's TP Documentation considered the contractual terms between the applicant and ELL and economic circumstances;

(iii) the applicant applied the TNMM Method in line with the TP Guidelines because external third party comparable data is readily available in Malaysia; and

(iv) the applicant performed a benchmarking analysis or comparability analysis to find independent companies with similar characteristics based on the findings in the functional analysis.

[48] The applicant highlighted that save for the description on the applicant and ELL's functions in the audit finding letters, the respondent did not consider and justify its decision based on the asset and risks undertaken by the parties, contrary to the requirements of the TP Guidelines. According to the applicant, the respondent's lack of reasoning is especially evident when it abruptly came to the incongruous conclusion that the adjusted 5% mark-

A up on the leasing charges by ELL is "similar to the 20% profit margin to be allocated to ELL and 80% to be allocated to the applicant". It is submitted that this conclusion was reached without providing any justification and is in any event, unsustainable by any measure. So, without a transfer pricing report, the applicant submits that it can only assume that no functional, asset
B and risk analysis was undertaken by the respondent and the respondent does not have good reasons to disagree with the applicant's transfer pricing documentation.

[49] It is apparent that not only the applicant who is left in the dark as to how the respondent came to its transfer pricing adjustments. The court for
C that matter is deprive from knowing the respondent's version of what the transfer pricing report ought to be. What are the factors did the respondent consider? Did it perform the most perfunctory functionary and economic analysis? What are the comparables used in the economic analysis and for that matter, did the respondent comply with its own transfer pricing
D guidelines?

[50] It has been said that additional assessment is rooted in fairness and that there is a duty on the part of the respondent being an important public authority to give its reasons more so, when the issues pertaining to transfer pricing are complex matters and can never be straightforward. As the
E applicant has submitted and this court agrees, that at the very least, the most basic transfer pricing report by the respondent will be able to shed some light on the applicant on this issue because without some basis, how would the applicant be able to adequately defend itself before the Special Commissioners of Income Tax. The applicant's basis and justifications for
F the pricing of the leasing transactions is definitely in stark contrast to the respondent's failure to provide its own transfer pricing report to the applicant.

[51] The case of *MM Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] MSTC 10-046 is highlighted to this court where the Special Commissioners
G of Income Tax held as follows:

> *Based on the above citation, we the Special Commissioners are aware of the Respondent's version of the shortcomings in the Appellant's transfer pricing reports, but we do not know what is the Respondent's version of what the transfer pricing reports ought to be in this case, not to mention that such Respondent's version (if it*
H *existed) of the reports were not put to the Appellant's witnesses.* Hence, the Respondent is in breach of the principle enunciated in *Aik Ming*'s case (*supra*). (emphasis added)

[52] It can be taken as trite law that as a public decision-making body, the respondent is under a duty to give reasons for its decision. In *Kesatuan*
I *Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265, the Federal Court held as follows:

> [86] It is also settled public law principle and principle of natural justice that a public decision-making body is under a duty to give reasons for its decision. Indeed, a reasoned decisions can be an additional constituent of the concept of fairness … The giving of reason is also one of the fundamentals of good administration.
>
> [89] *In our view, in exercising his powers and/or discretion and making a decision under s. 12 of TUA 1959 the DG must have a reason for that decision. It is not a fanciful decision and the discretion can never be exercised willy nilly. Being in that position, it is reasonable and appropriate to imply that he ought to have given reason/s for his decision. He did not do so, for he was under the erroneous belief (as stated in his affidavit in reply) that he has "kuasa budi bicara yang mutlak". He has not.* (emphasis added)

[53] A recent Court of Appeal decision on 27 January 2021 in *Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors* [2021] 2 CLJ 808 reaffirms this principle. On the issue of duty to give reasons, Her Ladyship Mary Lim to give reasons. We would have thought that the law on this issue is fairly clear and settled from the early years of *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 where it was ruled that a "reasoned decision can be an additional constituent of the concept of fairness" and where the reasons have to be given so that the right of appeal may be properly and meaningfully exercised; to *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 (*MPPP*) where the Federal Court extensively reasoned on why there must be this duty to give reasons even if there is no express provision for such duty. According to the Federal Court, this duty to give reasons emanates from the concept of fairness; see also *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265 and *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 10 CLJ 36. (See discussions of the same in *Save Britain's Heritage v. Secretary of State for the Environment & Others* [1991] 2 All ER 10).

[54] In *Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais* [2020] 9 CLJ 521; [2021] 2 MLJ 120 (approved by the Federal Court in Civil Appeal No. 08(f)-477-12-2019(W)), the Court of Appeal held that:

> From the most recent pronouncement of the Federal Court in the *Kesatuan Pekerja-Pekerja* case abovementioned and the House of Lords case of *Doody v. Secretary of State for the Home Department and other appeals* [1993] 3 All ER 92, as well as other authorities referred to by the Federal Court in *Kesatuan Pekerja-Pekerja* the legal position in respect of the duty to give reasons as applied to the facts of the instant case can be summarised as follows. One, the absence of specific provisions in the GST Act which requires the Director General to give reasons for its decision cannot be interpreted to mean that no reasons need be given. Two, if no

reasons need to be given by the Director General, the GST Act must expressly state so. In the instant case, there is no such express provision in the GST Act which exempts the Director General from having to give reasons for its decision. Three, a duty by the Director General to give reasons for its decision may be implied in the particular circumstances, as the decision is not straightforward but is dependent on many factors which include compliance with the legal requirements under the GST Act, as well as an audit certification of physical stock in hand by an approved auditor. *In addition, the crucial need for the submission of accurate data by the applicant of the special refund as mandated by s. 191(3) of the GST Act places an onerous burden on the applicant to comply with the requirements of the GST Act and by necessary implication, a corresponding duty on the Director General to give reasons for its decision to reject the applicant's refund application.*

In addition, as a public decision-making body, the Director General of Customs and Excise, (the respondent) has a duty to give reasons for its decision. As stated by the Federal Court in the Kesatuan Pekerja-Pekerja case, a reasoned decision can be an additional constituent of the concept of fairness (Rohana bt Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ 487 and Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Ors [2005] 5 MLJ 193). The giving of reasons is also one of the fundamentals of good administration, as it inculcates transparency and accountability in public decision-making bodies like the Director General of Customs and Excise. (emphasis added)

[55] The only TP documentation available is the one prepared by the applicant. There is no evidence available in any documentary form from the respondent to show what would have been the leasing rates payable between independent persons dealing in arm's length. In the circumstances, it is of the considered view that the respondent had acted arbitrarily by not proffering any reasons and evidence to support its decisions and as such the decisions amount to a breach of the principles of natural justice and procedural fairness. As stated by the Court of Appeal in *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517:

> The law is clear that a decision-maker must adhere to the basic principles of nature justice and procedural fairness. Failure to do so will lead to a justifiable ground of intervention by a court of judicial review.

Lifting Of The Time Bar

[56] The respondent had further embarked on its power to lift the time-bar beyond the five years period pursuant to s. 91(3) of the ITA which reads:

> The Director General where it appears to him that:
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent,
>
> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

[57] The respondent submits that determination of the assessment beyond the time limitation is an issue that relates to the merit of the assessment itself. According to the respondent, to determine fraud, wilful default or negligence prescribed under s. 91(3) of the ITA involves finding of facts and it is the task of the Special Commissioners of Income Tax to determine. The respondent submits that negligence for that matter cannot be evaluated in isolation and can only be assessed by the "bird's eye view" against the entire facts of the case.

[58] Section 91(5) of the ITA provides that the respondent has seven years time bar period to raise assessment or additional assessment in respect of transfer pricing adjustments. Section 91(5) of the ITA reads as follows:

> The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax in consequence of the Director General's determination pursuant to subsection 140A(3), may in that year or within seven years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year

[59] In raising the assessment for YA 2012 on 22 July 2020, the respondent's seven years time bar period had lapsed. The issue is whether the exception for the lifting of the time-bar provided under s. 91(3) of the ITA exists. The burden lies on the respondent to show that fraud or wilful default has been committed or that the applicant has been negligent. In *Government Of Malaysia v. Gan Chuan Lian* [1992] 1 CLJ 678; [1992] 2 CLJ (Rep) 424; [1992] 1 MLJ 449, the defendant therein resisted leave to sign final judgment for the tax for the period from 1967 to 1973 on the ground that they are statute-barred. The High Court made reference to the Supreme Court decision in *Chong Woo Yit v. Government Of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9; [1989] 1 MLJ 473 with regard to the issue of limitation and stated as follows:

> With regard to limitation, in *Chong Woo Yit v. Government of Malaysia*, in agreeing with the judgment in *NTS Arumugam Pillai v. Government of Malaysia*, this is what Gunn Chit Tuan SCJ said:
>
> > We would agree that by virtue of the proviso to s. 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceeding by the government for the recovery of any tax or interest thereon, although for the purpose of an assessment or additional assessment of tax under s. 91 of the Income Tax Act 1967 not made in any year of assessment or within 12 years after its expiration, the Revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment.

> Although in that case the Supreme Court dismissed the taxpayer's appeal on the ground that there were no triable issues, *it is manifestly clear from that citation that the Supreme Court recognized the burden on the part of the Revenue to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment for the purposes of an assessment or additional assessment of tax under s 91 of the Act not made in any year of assessment or within 12 years after its expiration. Therefore, it follows that if the Revenue fails to discharge that burden it cannot legally make the additional assessment after a lapse of 12 years. To my mind, in that restrictive sense, limitation can be said to exist.* (emphasis added)

[60] It is apparent that from the audit finding letters and the bundles of documents tendered by the applicant, there were lengthy and extensive audit done by the respondent relating to the present matter. However, at no point of time during the course of the lengthy auditing, the respondent has ever cited any instances of negligence, fraud or wilful default on the part of the applicant which justifies the invocation of its powers under s. 91(3) of the ITA. There is no evidence or proof whatsoever. Here again the respondent demonstrates absence of considerations or reasons in its decisions in lifting the time-bar. The respondent did not raise any allegations of fraud, wilful default or negligence during the course of the audit nor during the issuance of the notices of additional assessment. A taxing authority would have been able to discern if the applicant had neglected any of its duties under the ITA or could have detect any fraud or wilful default on the part of the applicant considering the extensive documents provided during the course of and the lengthy duration of time taken in the audit. Instead, what the respondent is now saying is for the parties to go before the Special Commissioner of Income Tax and "find out" whether there is any negligence, fraud or wilful default committed by the applicant in its transfer pricing policy.

[61] The respondent as the tax authority in conducting the audits ought to have come to a finding to support a conclusion of wrongdoing by the applicant for it to exercise the power under s. 91(3) of the ITA. In the case of *Government Of Malaysia v. Ng Song Choon* [1974] 1 LNS 41; [1975] 1 MLJ 131, Arulanandom J stated as follows:

> It is true that it is not for the Director General to disclose any of these things to the taxpayer when he makes the assessments but if he seeks to obtain judgment of the court the court must be satisfied that there was fraud or wilful default or negligence on the part of the taxpayer before it can decide whether the assessment was barred by limitation. It is essentially a legal issue and it falls outside the scope of section 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea

> shall be entertained by the court. Although this may be a tax case as was stated earlier one cannot read more into the Act than what is expressly and unambiguously stated. The taxpayer, the defendant in this case is not precluded from raising the plea that the claim is statute barred and until and unless the court is satisfied that the Director General exercised his powers correctly when making the assessment under section 91(3) the court cannot possibly adjudicate.

[62] The respondent's failure to particularise the basis for the exercise of its powers under s. 91(3) is fatal, and the court is entitled to infer that there is no good reason to do so (see *Pahang South Union Omnibus Co Bhd v. The Minister Of Labour & Manpower & Anor* [1981] CLJ 83; [1981] CLJ (Rep) 74; [1981] 2 MLJ 199).

[63] Based on the foregoing discussions it is the finding of this court that the respondent's decisions fit into the test laid out in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1947] 2 All ER 680, namely that the decisions are so unreasonable that no reasonable tax authority would have come to it. The respondent also took into account irrelevant considerations and ignored relevant considerations in coming to its decisions in an unreasonable manner entitling the court to make the order to quash the decisions.

The Alternative Remedy

[64] It is open for a taxpayer to exhaust its appeal *via* the alternative internal remedy ie, appeal to the Special Commissioners of Income Tax. Nevertheless, such legal position is not a blanket approach and does not shut out an aggrieved taxpayer from coming to court seeking for the remedy of judicial review on the premise that there exists an internal appeal process. The mere fact that the applicant may appeal to the Special Commissioners of Income Tax does not mean that the applicant has lost its rights to appeal to the High Court by way of judicial review. The Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 had held that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available. The Federal Court stated further:

> Why should illegal action not be nipped in the bud by the quicker, more convenient and adequate remedy of Judicial Review rather appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest.

[65] In *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri (supra)*, it was held that:

> … the availability of an alternative internal remedy in the form of an appeal process will not bar an application for judicial review. This is so especially where the complaint made to the court is one on error of law or abuse of power that goes to the legality of the conduct of the decision-making authority as in this case.

[66] In the present matter, exceptional circumstances of the case have been established at the leave stage which is a starting point in judicial review cases. Illegality, unlawful treatment, error of law and failure to adhere to legal principles established by the courts tantamount to an excess of jurisdiction and all of which this court finds have been demonstrated by the applicant. It would be wrong to insist that the applicant exhausts its statutory right of appeal, even if it is available. In fact a complaint that raises a question of law, as in the present case, would preferably be referred to the court, being a more appropriate forum (Rohana Yusuf J (as Her Ladyship then was) in *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* (*supra*)).

Stay Of Proceedings

[67] This court will not address the issue of the application of stay of proceedings by the applicant which was addressed again at great length by the respondent at this stage. The stay application had been allowed by this court at the leave stage on 22 December 2020. No appeal was filed by the respondent against the stay order. To ventilate or re-litigate the matter again at this stage would tantamount to an abuse of courts' process.

[68] The Court of Appeal decision in *SIS Forum (Malaysia) & Ors v. Jawatankuasa Fatwa Negeri Selangor & Ors* [2018] 6 CLJ 748; [2018] 3 MLJ 706 is instructive. The case involved an appeal against the decision of the High Court allowing the respondent's preliminary objection in a judicial review preliminary objection that the High Court had no jurisdiction to hear the matter. During the hearing of the judicial review, the respondents therein raised a matter on *fatwa* as it was within the jurisdiction of the Syariah Court. The High Court Judge, dismissed the respondent's preliminary objection and ordered for the case to be heard on its merits. However, before the substantive application could be heard, the case was taken over by another High Court Judge. The respondents raised the preliminary objection again and this time it was allowed. The appellants' application for judicial review was dismissed. In that appeal, the issue the Court of Appeal had to consider was whether the High Court Judge was right in reversing the decision of the earlier High Court Judge. The Court of Appeal decided that the issue was *res judicata* and it was not open for the High Court to decide on the same issues, in the same case, involving the same parties. The Court of Appeal stated as follows:

> We did not think this would make any difference, as the preliminary objection was raised and the objection was considered and dismissed by the learned judge. In any event, not all was lost for the first and third respondents. They could still raise the issue on appeal to this court after the review application had been finally determined on the merits by the High Court.
>
> A decision had been made that the High Court had jurisdiction to hear the judicial review application. The respondents elected not to appeal against the decision …
>
> … The issue was *res judicata*. With due respect to the learned judge, her decision effectively means that the High Court had rendered two inconsistent and irreconcilable decisions on the same matter in the same proceedings involving the same parties.
>
> It is trite law that a court of co-ordinate jurisdiction has no power to override the decision of another court of coordinate jurisdiction. Clearly, the learned judge was not at liberty to do so. What she should have done was to proceed to hear the application on the merits.

[69] Based on decision in the above case, the stay application issue raised by the respondent is put to rest.

Conclusion

[70] Premised on the reasons set out in the above, this court granted order in terms of the applicant's application.